

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-133322

DATE: MAY 6 1976

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MATTER OF: Cost-of-living adjustment for certain judicial officers - Maximum salary

- DIGEST:
1. Cost-of-living provisions of 28 U. S. C. § 461 do not apply to compensation of part-time United States magistrates and citizen jury commissioners. Inasmuch as section 461 lists the specific classes of judicial officers covered by its provisions, all not mentioned are deemed to have been intentionally excluded. However, 5 U. S. C. § 5307 authorizes administrative adjustment of the statutory maximum compensation for part-time United States magistrates and citizen jury commissioners.
 2. Cost-of-living increases of 28 U. S. C. § 461 should be applied to the increment of compensation fixed for the referee duties of combination referees in bankruptcy-magistrates while the cost-of-living increases of 5 U. S. C. § 5307 may be applied to the increment of compensation fixed for magistrate duties of these officials. The entire compensation of combination clerk-magistrates is subject to the cost-of-living adjustment provisions of 5 U. S. C. § 5307.

This matter involves requests from Rowland F. Kirks, Director, Administrative Office of the United States Courts, by letters of October 9 and 16, 1975, for an advance decision concerning the authority of that office to provide cost-of-living increases to certain judicial officers.

First, he asks whether the Executive Salary Cost-of-Living Adjustment Act, Public Law 94-82, August 9, 1975, 89 Stat. 419, may be applied to adjust the compensation of part-time United States magistrates including combination clerk-magistrates and combination referees in bankruptcy-magistrates appointed under 28 U. S. C. § 631 (1970), and citizen jury commissioners appointed under 28 U. S. C. § 1863(b)(1) who are serving at the otherwise applicable maximum rate of compensation.

Section 205 of Public Law 94-82 amends various provisions of titles 11 and 28 of the United States Code to provide a cost-of-living adjustment to the salaries of certain judicial officers. Section 205(a)(1) adds a new section 461 to chapter 21 of title 28, United States Code, which provides for adjustments in certain salaries, as follows:

"(a) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of title 5 in the rates of pay under the General Schedule * * * each salary rate which is subject to adjustment under this section shall be adjusted by an amount, rounded to the nearest multiple of \$100 (or if midway between multiples of \$100, to the next higher multiple of \$100) equal to the percentage of such salary rate which corresponds to the overall average percentage (as set forth in the report transmitted to the Congress under such section 5305) of the adjustments in the rates of pay under such Schedule. * * *" (Emphasis supplied.)

The Director states that the language underscored above is ambiguous inasmuch as the section does not expressly identify or otherwise explain which salaries are "subject to adjustment under this section." Therefore, the Director believes it may be possible to apply the general salary adjustment provisions of 28 U. S. C. § 461(a), supra, to provide cost-of-living adjustments to the salaries of all or most judicial officers appointed under the provisions of title 28. However, he recognizes that section 461 could be construed to apply only to those salary provisions which incorporate section 461 by specific reference. Such a construction would exclude part-time magistrates and citizen jury commissioners. He also suggests a third construction to the effect that part-time magistrates were intended to be left under the adjustment provisions of 5 U. S. C. § 5307. If so, he inquires whether the \$15,000 maximum may be exceeded by virtue of § 5307.

The intent of Congress is controlling in reading any statute and the plain and obvious meaning is the safest interpretation and the one that most clearly expresses legislative intent. National Forest Preservation Group v. Volpe, 352 F. Supp. 123, 126 (1970). A

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review of section 205 of Public Law 94-82, indicates that the language of the statute clearly identifies "each salary rate which is subject to adjustment under this section." Subsection (b) of section 205 enumerates eight classes of judicial officers whose salaries are to be adjusted by section 461 of title 28, U. S. Code. For each such class, section 205(b) amends the relevant section of the United States Code which provides for the compensation to be received by the members of the class, and in each case the amendment specifically incorporates the adjustment provisions of 28 U. S. C. § 461. Thus, the "certain salaries" and "each salary rate which is subject to adjustment under this section * * *" referred to in the title and text of 28 U. S. C. § 461, are identified.

Moreover, we are of the opinion that the rule of statutory construction, expressio unius est exclusio alterius (the enumeration of certain things in a statute implies the exclusion of all others), should be applied in interpreting section 205. Therefore, where a statute such as the one under consideration enumerates the persons affected, it should be construed as excluding from its effect all those not expressly mentioned. Continental Casualty Co. v. United States, 314 U. S. 527 (1941), McDonald v. Board of Election Commissioners of Chicago, 277 F. Supp. 14 (1967), United States v. Aguino, 338 F. Supp. 1080 (1972).

We, therefore, conclude that the salary adjustment provisions of 28 U. S. C. § 461, supra, may be applied only to those judicial officers expressly mentioned in section 205 of Public Law 94-82. Since full-time and part-time United States magistrates and citizen jury commissioners are not mentioned therein, they are not covered by the salary adjustment provisions of 28 U. S. C. § 461.

Also, the language of 28 U. S. C. § 461(a) states " * * * each salary rate * * * shall be adjusted * * * ." The United States Supreme Court has held that normally the word "shall" should be construed as a command. Escoe v. Zerbst, 295 U. S. 495 (1935), Boyden v. Commissioner of Patents, 441 F.2d 1041 (1971). Therefore we conclude that section 461(a) requires a mandatory adjustment.

However, even though part-time magistrates and citizen jury commissioners are not covered by 28 U. S. C. § 461, we believe that their salaries may be adjusted administratively under 5 U. S. C. § 5307. We further believe that the \$15,000 per annum maximum salary limitation prescribed in 28 U. S. C. § 634(a) (Supp. III, 1973) for part-time

Magistrates and the \$50 per day maximum compensation prescribed in 28 U.S.C. § 1863(b)(1) (1970) for citizen jury commissioners may be exceeded by virtue of the salary adjustment provisions of 5 U.S.C. § 5307 (1970) which provides in pertinent part as follows:

"§ 5307. Pay fixed by administrative action.

"(a) Notwithstanding section 665 of title 31--

"(1) the rates of pay of--

"(A) employees in the legislative, executive, and judicial branches of the Government of the United States * * * whose rates of pay are fixed by administrative action under law and are not otherwise adjusted under this subchapter * * *

"(2) any minimum or maximum rate of pay * * * and any monetary limitation on or monetary allowance for pay, applicable to employees described in subparagraphs (A), (B), and (C) of paragraph (1) of this subsection;

may be adjusted, by the appropriate authority concerned, effective at the beginning of the first applicable pay period commencing on or after the day on which a pay adjustment becomes effective under section 5305 of this title, by whichever of the following methods the appropriate authority concerned considers appropriate--

* * * * *

"(iii) in the case of minimum or maximum rates of pay, or monetary limitations of allowances with respect to pay, by an amount rounded to the nearest \$100 and computed on the basis of a percentage equal or equivalent, insofar as practicable and with such variations as may be appropriate, to the percentage of the pay adjustment provided under section 5305 of this title.

"(b) An adjustment under subsection (a) of this section in rates of pay, minimum or maximum rates of

pay, and monetary limitations or allowances with respect to pay, shall be made in such manner as the appropriate authority concerned considers appropriate."

The above-quoted statute thus provides discretionary authority to adjust the minimum or maximum rates of pay of employees of the judicial branch, whose pay is fixed by administrative action by an amount rounded to the nearest \$100 and computed on the basis of a percentage equal or equivalent, insofar as practicable and with such variations as may be appropriate, to the percentage of the pay adjustment provided under 5 U.S.C. § 5305 (1970). See U.S. Code Cong. and Ad. News p. 5925 (1970). Inasmuch as the pay of part-time magistrates and citizen jury commissioners is fixed by administrative action under 28 U.S.C. § 633(b) and 28 U.S.C. § 1863(b)(1), respectively, we are of the opinion that the maximum statutory rates of pay of these officials may be adjusted pursuant to the provisions of 5 U.S.C. § 5307, supra, so that the maximum rates of pay set forth in the applicable statutes may be exceeded.

Adjustments of minimum and maximum pay ceilings should be effected in accordance with 5 U.S.C. § 5307(a)(iii), which contemplates adjustment of the annual salary rates of employees involved inasmuch as the aforementioned statute requires that the amount of any adjustment be rounded to the nearest \$100. Thus in computing the adjustment for citizen jury commissioners, whose maximum compensation is set at \$50 per day under 28 U.S.C. § 1863(b), it will be necessary to assume an annual rate of basic pay based on 52 basic administrative workweeks of 40 hours divided into five regular days as set forth in 5 U.S.C. § 5504(b) and 5 U.S.C. § 6101. Therefore the assumed initial maximum annual rate of basic pay for citizen jury commissioners would be \$13,000. After the annual adjustment is computed, a per diem adjustment increment should be determined and added to the \$50 per day maximum statutory compensation for the initial adjustment.

Finally, the Director states that at the time of the prior cost-of-living adjustment, the Administrative Office understood that 5 U.S.C. § 5307 did not allow the statutory maximum salary to be exceeded, and he asks whether it is necessary to redetermine such adjustment. We do not think so. Clearly, the language of section 5307 is discretionary and not mandatory. See U.S. Code Cong. and Ad. News 5925 (1970). Since a decision was made at the time of the last cost-of-living increase not to grant it to these

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officials, regardless of the reasons therefor, we believe it would be inappropriate to reverse that decision retroactively at this time.

On the other hand, 5 U.S.C. § 5307 provides authority to make administrative adjustments retroactively effective to the date authorized for adjustments under statutory pay systems. 51 Comp. Gen. 709 (1972). Hence it is clearly within the discretion of the appropriate officials to grant an adjustment under section 5307 retroactive to October 1, 1975, the effective date of the cost-of-living increase that led the Director to seek our opinion on these questions.

R. F. Keller

Deputy ³ Comptroller General
of the United States